Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

DANIEL C. MOTLEY,

Petitioner,

v.

NEW JERSEY STATE POLICE; THE STATE TROOPERS FRATERNAL ASSOCIATION OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether or not the Court of Appeals for the Third Circuit decided the present case in a manner that conflicts with this Court's decision in *Cleveland v. Policy Management Sys. Corp*, 526 U.S. 795, 119 S. Ct. 1597 (1999) by failing to remand plaintiff's American Disabilities Act claim so that he would have the opportunity to sufficiently explain perceived inconsistencies between his claim and prior sworn statements in a disability application.

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STATEMENT OF JURISDICTION

The judgment of the Court of Appeals (App. 26a-27a) was entered on November 1, 1999. This Court's jurisdiction is predicated upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent statute involved in this case is the Americans with Disabilities Act (ADA). 42 U.S.C. § 12101 *et seq*. The specific sections at issue are:

> 42 U.S.C. § 12111(8) Definitions: Qualified individual with a disability
>
> The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position such individual holds or desires.
>
> 42 U.S.C. § 12112(a) Discrimination: General rule
>
> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job

application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

STATEMENT OF THE CASE

This case presents the story of a man who became physically disabled in a work related accident and was then horribly mistreated by his employer. The man is Petitioner, Daniel C. Motley. The employer is Respondent, the New Jersey State Police (NJSP). Following his accident, Mr. Motley was denied promotion for three consecutive years even though he performed all the tasks of a full duty narcotics detective. The only reason Dan was denied promotion is that the NJSP considered him disabled. He was also denied any reasonable accommodation. Both denials are clear violations of the Americans with Disabilities Act ("ADA"). 42 U.S.C. § 12101, *et seq.*

A critical aspect to this case is the internal policy and procedure of the NJSP regarding promotion. (App. 42a). The NJSP has codified Standard Operating Procedures (S.O.P.'s). S.O.P. C-20 addresses the relationship between promotion and physical fitness. *Id.* In order to even be considered for any promotion, all members of the NJSP must first be cleared by the NJSP physician to take the required fitness exam. The member must also pass the exam. *Id.*

There are three official duty statuses with the NJSP — full duty, limited or "light" duty, and off duty. Only members listed by the NJSP physician on full duty status are permitted to participate in the fitness exam. Members not cleared to participate have one of two fates awaiting them under S.O.P.

C-20. One possibility is that their continued fitness for employment is reviewed by the Chairman of the Duty Status Review Board. Specifically, S.O.P. C-20(G)(4)(b) requires:

> If the Division physician and the Administration Section supervisor determine that the member is unable to participate in the physical fitness test, the administration *shall* forward all documentation to the Chairman (Deputy Superintendent) of the Duty Status Review Board. (1) The board, after determining the facts shall evaluate the member's fitness for continued employment in the Division of State Police and submit appropriate recommendations to the Superintendent (emphasis supplied).

The second possibility is that the Superintendent, following a special request from the member, waives the fitness exam requirement, and the member is considered for promotion notwithstanding his or her non-participation. Here, S.O.P. C-20(H)(2)(a) is controlling:

> A sworn member who does not satisfactorily complete any portion of the physical fitness test due to a temporary medical or physiological problem will not be automatically excluded from the promotional process. Promotional eligibility for such members will be determined by the Superintendent on a case-by-case basis.

Against this backdrop, we can now present the details of Dan Motley's experience with his former employer.

Dan Motley joined the NJSP in February 1982. Like all rookie members, Mr. Motley began his career at the rank of

Detective. Lying ahead were tenure based promotions to Detective II and Detective I at seven and nine years respectively. Beyond that were "rated" or "merit based" promotions to Sergeant, Sergeant First Class, and so on.

After seven years, Detective Motley received his first tenure based promotion. However, S.O.P. C-20 was passed before Detective Motley's ninth year. Therefore, promotion to Detective I became subject to S.O.P. C-20. Although he did not know it at the time, Dan Motley would retire before ever achieving the rank of Detective I.

On January 24, 1990, the course of Detective Motley's career was forever altered. During an undercover buy-bust operation, Dan was pulled into the driver's side window of a fleeing vehicle. Half his body was hanging out the window and he was dragged approximately 150 feet.

Detective Motley was seriously injured as a result of this incident. Between January 24, 1990 and February 8, 1990, he was listed as "off duty." On February 9, 1990 Dan was re-assigned to "Temporary Limited On Duty" status by the NJSP physician. However, due to his "limited duty" or "light duty" status, Detective Motley was not permitted to participate in the State Police Fitness exam in 1990. Therefore, he could not be considered for promotion. In fact, Detective Motley was not cleared to participate in the fitness exam in 1991, 1992, 1993 or 1994 — the year he ultimately retired. In other words, after his accident, he was never again permitted to participate in the fitness exam, and therefore was never again considered for promotion.

Despite persistently preventing Motley from participating in the fitness exam, the NJSP failed to refer his

case to the Chairman of the Duty Status Review Board, an action mandated by S.O.P. C-20. The NJSP admitted this fact in answers to interrogatories. Instead, Motley was continually listed for limited duty, thereby eliminating any possibility of promotion and corresponding raises in pay. However, despite his recorded duty status, *Motley continued to receive and perform full duty status assignments*. For almost four years after his accident, but before his retirement, Detective Motley continued to break down doors, execute search and arrest warrants, sit on wire-taps, develop confidential informants and do anything and everything else required of a full duty status narcotics Detective. Moreover, he received several commendations for his work during this time period. In her dissent, Circuit Judge Rendell provides an excellent summary of Detective Motley's performance evaluations, all of which plainly demonstrate the full duty nature of his work after the accident. *Motley v. New Jersey State Police*, 196 F.3d 160, 170-71 and n.6.

The submission of each performance evaluation became a source of ultimate frustration for Detective Motley. On the one hand, he was receiving and performing full duty assignments and his performance was stellar. On the other hand, the Division Physician continued to categorize Detective Motley as a "limited duty" member for purposes of the fitness exam. Therefore, at the section designated for promotional potential, each performance evaluation states "no recommendation at this time due to non-participation in the physical fitness test."

In response to being painted into a corner of "promotion purgatory", Detective Motley did not sit on his hands. In fact, after being denied his promotion to Detective I in August 1991, Detective Motley immediately filed a grievance

through the State Troopers Fraternal Association ("STFA"). Then, Detective Motley waited. For months he waited patiently, but there was never any answer from the NJSP or the STFA regarding the grievance.

A full year after the grievance was filed, no action had been taken.[1] During this period of inexplicable delay, Detective Motley took additional action to protect his interests. In essence, he forced the NJSP to pick between retiring him or promoting him — the two choices mandated by S.O.P. C-20.

On April 7, 1993 he filed an application for accidental disability retirement pursuant to N.J.S.A. 53:5A-10(a). Less than one month later, on May 4, 1993 he filed a second grievance through the STFA which formally complained of the non-progression of the first grievance. The second grievance was flatly denied on July 11, 1993. Then, in November 1993 Detective Motley submitted a written Request for Determination to Superintendent Dintino pursuant to S.O.P. C-20(H)(2)(a). In other words, Detective Motley made a request for reasonable accommodation. Despite the plain language of the S.O.P., (*see* text, *supra.* at 3) the Superintendent's response amounted to no response at all. In a memo dated December 8, 1993 the Superintendent stated in pertinent part, "[w]ith reference to the attached correspondence; advise Det. D.C. Motley #3655 that it has been Division policy not to provide written data regarding his inquiry."

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1. In fact, Detective Motley's first grievance was not resolved until more than a year after he retired. The determination was in favor of the NJSP. Originally, Motley joined the STFA as defendants in this action. The count against the STFA was dismissed, but that aspect was never appealed.

In short, for almost four years, the NJSP used S.O.P. C-20 to stop Motley from taking the fitness exam, thereby blocking the possibility of promotion. However, the outfit also refused to either waive the requirement or submit his case to the duty status review board. Instead, the NJSP was more than happy to extract superior full duty performance while only having to pay Mr. Motley at the rank of Detective II for the rest of his life.

Fed up with this stonewalling, in January 1994 Detective Motley filed complaints concurrently with the New Jersey Division of Civil Rights ("NJDCR") and with the Equal Employment Opportunity Commission ("EEOC"). He also allowed his application for disability benefits to go forward.

In February 1994, Motley's application for disability was granted. However, there is an administrative waiting period between the application being granted, actual retirement, and receipt of first payment. During this period, Motley realized his initial application was not entirely accurate. Therefore, before he ever received a payment, Mr. Motley amended his application, thus providing the board an opportunity to reverse its initial decision. This aspect of the case warrants detailed explanation.

As indicated, there are two disability applications involved in this case. The first was signed by Mr. Motley on April 7, 1993 and contains three critical portions, namely items 19, 20 and 23. (App. 56a). A pre-printed item, number 19 compels the applicant to state, "I declare I am permanently and totally disabled as a direct result of a traumatic event occurring during and as a result of the performance of my regular or assigned duties . . ." The applicant must simply fill in the date, time and place of the incident. Item 20 asked

Mr. Motley to state his symptoms. On the April 7, 1993 application, Mr. Motley replied:

> Since my accident I have had extremely painful and recurring headaches. I also have intense back pain whenever I sit for prolonged periods (i.e. 20 minutes or more). I have difficulty sleeping at night and wake up almost every 2-3 hours because of pain in my lower back. Before I start my day I must take an extremely long and hot shower to loosen the spasms in my back. Finally, I have extreme pain in my left knee. I cannot stand on it without pain and I have extreme difficulty with running.

Finally, item 23 asked "Have you performed regular duty since the traumatic event?" On April 7, 1993 Mr. Motley's answer was "No."

On March 15, 1994 Mr. Motley filed his amended application for disability. (App. 63a). The form was identical to the one filed April 7, 1993 with two exceptions. First, at item 20 regarding his symptoms, Mr. Motley, filling the application out by hand and on his own, wrote "I have received severe injuries to my knees, back and neck." Second, and most important, at item 23 regarding the performance of regular duty, Mr. Motley changed his answer of "No" to "Since the event I have been on light duty."

Now retired, Dan anxiously waited to hear from the EEOC regarding the complaint he filed in January 1994. Eventually, he became frustrated with the snail's pace of that process, retained predecessor counsel and filed a complaint in the United States District Court for the District

of New Jersey. Pertinent to this case is the count alleging a violation of the ADA.

Respondent NJSP moved for summary judgment and argued Mr. Motley was judicially estopped from asserting his ADA claim due to the representations made in his disability application. The District Court granted defendant's motion (App. 40a-41a) and Motley appealed.

In a two to one decision, The United States Court of Appeals for the Third Circuit affirmed the decision of the District Court. *Motley*, 196 F.3d at160. Significantly, the Circuit Court withheld its decision pending this Court's decision in *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999). In affirming the decision of the District Court, the majority purports to follow this Court's directives in *Cleveland*. However, in her dissent, Circuit Judge Rendell argues that the Circuit did not properly followed *Cleveland* at all. *Motley*, 196 F.3d at 168-71. Accordingly, Mr. Motley respectfully presents this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

Dan Motley is requesting the extraordinary remedy of a writ of certiorari for one reason. The Third Circuit decided his case, one which presents an important question of federal law, in a manner that conflicts with a relevant decision of this Court. Rules of the Supreme Court of the United States, Rule 10(c).[2] Specifically, and not withstanding its assertions

2. *See also Army & Air Force Exchange v. Sheehan*, 456 U.S. 728, 733 (1982) (certiorari granted because ruling below "appeared to be in conflict with [Court's] precedents"); *Schlaude v. Commissioner*, 372 U.S. 128, 130 (1968) (brought case back a (Cont'd)

to the contrary, in deciding Mr. Motley's case the Third Circuit failed to follow this Court's holding in *Cleveland v. Policy Management*, 526 U.S. at __, 119 S. Ct. at 1604. Accordingly, it is respectfully urged that Mr. Motley's petition for certiorari be granted.

A. The Directives of *Cleveland*

The question before this Court just last term in *Cleveland* was "whether the law erects a special presumption that would significantly inhibit [a Social Security Disability Insurance] recipient from simultaneously pursuing an action for disability discrimination under the [ADA], claiming that 'with . . . reasonable accommodation' she could 'perform the essential functions of her job.' " *Cleveland*, 526 U.S.

(Cont'd)
second time on certiorari "to consider whether the lower court misapplied the scope of *American Automobile Ass'n v. United States*, 367 U.S. 687 (1961)); *United States v. Rands*, 389 U.S. 121 (1967) (granting certiorari because of seeming conflict between decision below and existing precedent); *Wilkinson v. United States*, 365 U.S. 399 (1961) (granting certiorari because of petitioner's claim that Court of Appeals misconceived meaning of controlling precedent); *Wilson v. Schnettler*, 365 U.S. 381 (1961) (certiorari granted to consider petitioner's claim that "judgment was repugnant to controlling" precedent); *Braen v. Pfeifer Transportation Co.*, 361 U.S. 129, 130 (1959) (granting certiorari because Circuit Court's decision reversing judgment for plaintiff "seemed to be out of line with the authorities); *Upshaw v. United States*, 335 U.S. 410 (1948) (reversing decision of D.C. Circuit due to majority's misapplication of holding in *McNabb v. United States*, 318 U.S. 332 (1943)); and *McCandles v. Furland*, 296 U.S. 140, 156 (1935) (before the Court on a second writ of certiorari to consider Second Circuit's application of *Old Dominion Copper Co. v. Lewishon*, 210 U.S. 206 (1908)). *See generally, Stern & Gressman, Supreme Court Practice*, 7th Edition 1993 at § 4.5.

at __, 119 S. Ct. at 1599-1600 (citations omitted). In taking on this question, the Court sought to resolve conflict among the Circuits on the issue of judicial estoppel as applied in ADA cases. *Cleveland*, 526 U.S. at __, 119 S. Ct. at 1601 (citations omitted).

The simple answer to the question presented in *Cleveland* was no — the law does not erect any special presumption. Specifically, this Court held:

> We believe that, in context, these two seemingly divergent statutory contentions are often consistent, each with the other. Thus pursuit, and receipt, of SSDI benefits does not automatically estop the recipient from pursuing an ADA claim. Nor does the law erect a strong presumption against the recipient's success under the ADA. Nonetheless, an ADA plaintiff cannot simply ignore her SSDI contention that she was too disabled to work. To survive a defendant's motion for summary judgment, she must explain why that SSDI contention is consistent with her ADA claim that she could "perform the essential functions" of her previous job, at least with "reasonable accommodation."

Cleveland, 526 U.S. at __, 119 S. Ct. at 1600.

In crafting its decision, this Court drew a critical distinction between context related legal conclusions asserted in disability applications and "directly conflicting statements about purely factual matters." *Cleveland*, 526 U.S. at __, 119 S. Ct. at 1601. The former was the subject of this Court's ruling whereas the law regarding the latter was left

undisturbed. *Cleveland*, 526 U.S. at __, 119 S. Ct. at 1602-03. However, as it relates to the reason for granting Mr. Motley's petition, the most critical aspect of this Court's decision in *Cleveland* is what I will call a "decision not to decide."

Before this Court in *Cleveland* was a ruling from the Fifth Circuit which upheld summary judgment for defendant on the grounds that an "ADA plaintiff's representation to the SSA that she was totally disabled created a rebuttable presumption sufficient to estop her later representation that . . . she could perform the essential functions of her job." *Cleveland*, 526 U.S. at __, 119 S. Ct. at 1602. This Court left no question that such rebuttable presumptions have no place in ADA judicial estoppel analysis. Instead, future ADA plaintiffs must be able to provide a sufficient explanation for any perceived inconsistency that can overcome well settled summary judgment standards. But what does this mean for ADA plaintiffs, such as Mr. Motley, whose cases were pending in the Court of Appeals when *Cleveland* was decided and were disposed of on defendant's motion for summary judgment under what *Cleveland* deemed improper legal standards? In *Cleveland* this Court provided the answer — remand for further proceedings.

Despite having a record before it which included explanations for Ms. Cleveland's change in positions, this Court did not make a determination regarding the sufficiency of those explanations. Instead, this Court specifically directed,

> [t]he parties should have the opportunity in the trial court to present, or to contest, these explanations, in sworn form where appropriate.

> Accordingly, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

Cleveland, 526 U.S. at __, 119 S. Ct. at 1604.

The requirement to remand for further proceedings, particularly when a pending pre-*Cleveland* case was decided under improper judicial estoppel law, was underscored by this Court's treatment of the Eighth Circuit's decision in *Moore v. Payless Shoe Source, Inc.*, 139 F.3d 1210 (8th Cir. 1998) (*Moore I*). In *Moore I*, the Eighth Circuit affirmed the dismissal of plaintiff's ADA claim on summary judgment employing a standard set out in *Dush v. Appleton Elec. Co.*, 124 F.3d 957, 963 (8th Cir. 1997) (ADA plaintiff must present "strong countervailing evidence" to defeat defendant's motion for summary judgment premised on judicial estoppel theory). *Id.* The *Dush* standard was negated by *Cleveland*. Therefore, in a memorandum opinion, this Court granted plaintiff's petition for certiorari, vacated the decision of the Court of Appeals and remanded for further proceedings consistent with its holding in *Cleveland*. *Moore v. Payless Shoe Source, Inc.*, __ U.S. __, 119 S. Ct. 2017 (1999) (mem.).

It is the directive to remand which was flatly ignored by the majority in *Motley*.

B. The Third Circuit's Misinterpretation of *Cleveland*

The first reported decision out of the Third Circuit citing *Cleveland* was *Klein v. Stahl GMBH & Co. Machinefabrik*, 185 F.3d. 98 (3d Cir. 1999). Admittedly, *Klein* is not directly on point. For one thing, the underlying cause was a products liability action, not an ADA claim. *Klein*, 185 F.3d at 100.

Therefore, the holding was not directly premised upon *Cleveland*. In fact, the court specifically noted that its decision rested upon the principles set forth in *McNemar v. Disney Store*, 91 F.3d 610, 617 (3d Cir. 1996). Nevertheless, the case it noteworthy because it is the Third Circuit's first treatment of a judicial estoppel issue in the post-Cleveland era. In that first treatment, the court vacated the Magistrate Judge's dismissal of plaintiff's claim and remanded for further proceedings so that, among other things, the plaintiff would have the opportunity to offer a sufficient explanation for certain factual inconsistencies presented in varying affidavits. *Klein*, 185 F.3d at 111. Despite this *Cleveland*-like approach in a non-ADA case, in the Third Circuit's first treatment of an ADA case post-*Cleveland*, the majority of the panel misinterpreted this Court's holding. *Motley*, 196 F.3d at 162-67.

The *Motley* majority certainly did not misstate this Court's *Cleveland* holding. *Motley*, 196 F.3d at 164-65. Moreover, the opinion does not try to distinguish *Cleveland* as inapplicable. In fact, the majority goes out of its way three times to insist or imply that its ruling is premised upon the new rules set forth in *Cleveland*.[3] However, a careful

3. For example, the court announced, "[w]e will affirm [the decision of the District Court], not because he was estopped, but because Motley was simply not entitled to survive summary judgment in light of his prior assertions of total disability, and his failure to adequately reconcile his wholly inconsistent positions." *Motley*, 196 F.3d at 162. Additionally, the majority wrote, "[t]he Supreme Court in *Cleveland v. Policy Management Sys. Corp* explained how cases of this type should be handled, and it is that framework we apply here. *Motley*, 196 F.3d at 164. Finally, writing for the majority, Circuit Judge Nygaard declared, "Our decision is based squarely on the standard set out by the Supreme Court in *Cleveland*." *Motley*, 196 F.3d at 167.

examination of the majority opinion demonstrates the Third Circuit's misinterpretation of this Court's ruling.

As previously stated, and as pointed out in Circuit Judge Rendell's dissent, despite the explanations regarding inconsistency in the record before it, this Court never decided whether Ms. Cleveland's explanations were sufficient to overcome summary judgment. *Supra* at 12. *Motley*, 196 F.3d at 168. Notwithstanding this fact, the Third Circuit reads *Cleveland* as having made that critical decision. Specifically, Judge Nygaard observed,

> In *Cleveland*, the ADA plaintiff had proffered a sufficient explanation of the difference in her statements. * * * Cleveland appears to have made a factbased argument that her condition changed to some degree during the applicable time periods. This amounted to a sufficient explanation under the facts of Cleveland's case . . .

Motley, 196 F.3d at 165. Unfortunately, the Third Circuit is not alone in this misinterpretation of *Cleveland*. Recently, a State Court made the same error.[4]

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4. In *Pyrcz v. Branford College*, (1999 WL 706882) a Superior Court Judge in Massachusetts wrote

> In a recent case considering whether an application for Social Security disability benefits estops a plaintiff from pursuing a federal claim . . . under the [ADA] . . . the Court held that plaintiff's explanation of how the Social Security disability benefits application could be reconciled . . . sufficed to defeat a summary judgment motion. The specific explanation the Court found sufficient was that the plaintiff had requested accommodation . . . , had been denied . . . , and had subsequently been terminated.

Nevertheless, the simple truth is that when the Third Circuit decided *Motley*, no court had made any determination concerning the sufficiency of Ms. Cleveland's explanations. Instead, her explanations were being considered on remand in the trial court and "in sworn form" pursuant to the mandate of this Court. As to the reasoning which supports the need to remand in these cases, Circuit Judge Rendell hits the nail squarely on the head in her dissent. Her Honor astutely observes, "Here, we err not only in deciding the issue, but, even more, we err by deciding it based upon the record made when the rules of the game were very different." *Motley*, 196 F.3d at 169.

No doubt, this Court's decision to remand was premised upon what Judge Rendell couches as a "change in rules" argument. In other words, the record before this Court in *Cleveland* was created under Fifth Circuit law which allowed for a rebuttable presumption on the estoppel issue in defendant's favor if ADA plaintiff's had received or merely applied for social security disability. *Cleveland*, 526 U.S. at __. Similarly, the "change in rules" argument" is what presumably caused this Court to grant certiorari, vacate the judgment of the Eighth Circuit, and remand so that Ms. Moore could have a new record made under the rule in *Cleveland* as opposed to the now defunct rule in *Dush*. *Supra.* at 8-9. *See also Moore I*, 139 F.3d at 1210 and *Moore*, __ U.S. __, 119 S. Ct. 2017.

Dan Motley's record was made under the much criticized Third Circuit decision in *McNemar*. *Motley*, 196 F.3d at 169. Additionally, the District Court granted summary judgment relying exclusively on *McNemar*. *See Motley*, 196 F.3d at 169 n.4 (Rendell, Circuit Judge dissenting). Despite this fact, and despite having the opportunity to review this Court's

decision and directives in *Cleveland*, the Third Circuit did not remand, but instead tackled the task of assessing Mr. Motley's explanations for the statements in his disability applications and deemed those explanations insufficient to survive summary judgment. This failure to remand robbed Mr. Motley of his opportunity to offer a sufficient explanation for any alleged inconsistencies under the new rules of the game. Such a result creates a true miscarriage of justice and is contrary to this Court's decision in *Cleveland*.[5] Once again, Judge Rendell's observations state the argument succinctly:

> The District Court never considered any explanation, and the parties' discovery and arguments were clearly uninformed as to the need for an explanation. To now cull the existing record to make the argument, and resolve it in favor of the defendant under a new set of rules, is unfair.

Id.

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5. It is worth noting that the Seventh Circuit has also deprived an ADA plaintiff her opportunity to sufficiently explain any potential inconsistencies between her disability application and ADA claim. In *Feldman v. American Memorial Life Ins.*, 196 F.3d 783 (7th Cir. 1999), the District Court granted summary judgment for defendant because it felt plaintiff could not prove she was disabled. The Court of Appeals affirmed, but on entirely different grounds — namely judicial estoppel grounds. Even though the issue was never raised below, which explains why plaintiff never offered any explanation for the apparent inconsistencies, the court held, "[w]e reserve opinion on the district court determination that Feldman was not 'disabled.' Instead, we evaluate whether Feldman's contention that she is a 'qualified individual' under the ADA is precluded by her earlier declarations regarding her disability in her applications for SSDI benefits. We find this question dispositive here." *Feldman*, 196 F.3d at 789.

Presumably, the argument could be made that not every ADA case pending when *Cleveland* was decided is entitled to remand. Perhaps there is a case out there wherein the record is completely devoid of both explanation or even the possibility for explanation of inconsistency sufficient to overcome summary judgment. Assuming that is true, this is not that case.

As Judge Rendell observes, the majority in *Motley* misconstrues the explanations offered by petitioner by ignoring substantial portions of the record. *Motley*, 196 F.3d at 169-71. In the first place, the majority places far too much weight upon the declaration of disability in Mr. Motley's first application. The declaration is clearly a context based legal conclusion, not a specific factual assertion. Second, the majority also places too much weight on Mr. Motley's description of his injuries. Dan described his injuries with specificity, but he never once stated that those injuries made him unable to work, with or without accommodation. Surely, the State Police cannot convincingly argue that they thought his injuries made him unable to perform, as they continued to assign regular duties and evaluate his performance glowingly. Instead, the most respondent can say is that it thought his injuries made him unfit for promotion.

The majority also completely ignores Mr. Motley's request for accommodation, which the State Police saw fit never to answer, and his amended application. The amended application is a key fact in this case, particularly because of its timing. Dan filed the amended and accurate disability application before receiving any payments under the first application. His purpose in filing was to provide the NJSP an opportunity to amend its determination with more accurate information.

The majority also misconstrues the statute under which State Troopers make disability applications. The majority presumed that the board which approved Dan's application took reasonable accommodation into consideration. *Motley*, 196 F.3d at 170-71 n.8 (Rendell, Circuit Judge dissenting). Nothing in the statutory scheme would reasonably lead someone to this conclusion. *Id.* In fact, the opposite conclusion is far more logical in light of other disability statutes intended specifically for State Troopers which make reference to reasonable accommodation. *Id.* The statute under which Motley's application had to be filed has no such provision. *Id.*

Finally, the majority pays no attention whatsoever to what Detective Motley was actually doing nor to the NJSP's disregard for its own internal policy and procedure in Motley's case. The majority never acknowledged that Motley continued to perform his job as a narcotics detective for all four years after his accident. The majority never acknowledged the failure of the NJSP to refer Motley's matter to the duty status review board. The majority never acknowledged Motley's request for accommodation or the NJSP's feeble excuse for a response.

In other words, the majority ignored every fact of record which makes it abundantly clear that Mr. Motley might very well be able to provide an explanation in "sworn form" sufficient to convince a District Court Judge that a jury should hear this case. Misconstruing *Cleveland*, the Third Circuit would deny Mr. Motley his day in court.

CONCLUSION

Accordingly, and for the reasons stated above, it is respectfully requested that this Court grant Mr. Motley's petition for certiorari.

Respectfully submitted,

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